United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7578

B

P/S

United States Court of Appeals

For the Second Circuit

EDWARD BRUCKER, *et al.*,
Plaintiffs-Appellees,

v.

THYSSEN-BORNEMISZA EUROPE N. V., *et al.*,
Defendants-Appellees.

WILLIAM B. WEINBERGER,
Plaintiff-Appellee,

v.

RICHARD J. POWERS, *et al.*,
Defendants-Appellees.

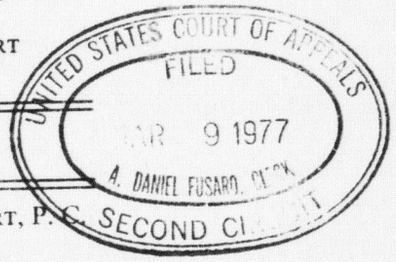
SHAMROCK CORPORATION, *et al.*,
Plaintiffs-Appellees,

v.

INDIAN HEAD INC., *et al.*,
Defendants-Appellees.

Appeal of MORTON P. ROME and MARJORIE T. ROME, Trustees under Trust Agreement made November 22, 1954, for the Benefit of SALLY P. ROME,
Objectors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF FOR PLAINTIFFS-APPELLEES

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THE ONLY ISSUE [1]

A. ROME'S VERSION. [2]

1. What Rome's Objection to the Settlement is All About.

In the last paragraph on the last page of his 66 - page Brief, Rome reveals in his prayer for relief what his appeal is all about. He asks for

> ". . . such appropriate directions as will prohibit alteration or impairment in any manner of the conversion rights into common stock of all debentures owned by objectors and other holders thereof without the affirmative consent of each debenture owner affected."
>
> [Brief, p. 66]

1/ All references to the Appendix are to "App." and to the Brief of Appellants, "Brief".

2/ Appellants' Brief is so argumentative, so unreferenced to the Appendix, so unsupported by legal authority, that it is as difficult for Appellees to answer -- or to know what to answer -- as it must be for the Court to read.

Breach of contract is what Rome claims.

Specific performance -- and specific performance alone -- is what he seeks.

2. What Rome's Objection Is NOT About.

Rome came to the Court below and represented:

> "I would also wish to make clear, not only to the Court, but to all counsel present that as counsel for the objecting parties here, we are not seeking to intrude into the Court's affirmation of the settlement if that is the conclusion that Your Honor reaches insofar as the common stock is concerned or the warrants are concerned, nor indeed do we seek to prevent those holders of convertible debentures who assent to that which is being proposed here from indeed assenting." (App. 244a)
>
> [Emphasis supplied.]

Thus, although the form of the appeal is from the entire judgment, in substance it is limited to debenture owners who did not assent in writing.

B. PLAINTIFFS-APPELLEES' COUNTER-ISSUE.

In Rome's Memorandum of Objections to the Court below; in his arguments at the settlement hearings; in his motions for a Stay and addressed to the Judgment; and in his Brief on this appeal, there is

one and only one issue:

Where a Convertible Debenture is convertible into Common Stock and two-thirds consent of the owners is required to add to, change or eliminate any provision of the Indenture, or modify their rights or obligations (App. 566a-567a); and,

Where the Company has the right to voluntarily redeem the Convertible Debentures for $1,033 (App. 202a); and,

Where the Company's 90% control stockholder proposed a short-form Delaware "freeze out" merger under which it will pay the Convertible Debenture owners $779 cash (App. 359a); and,

Where, in class action litigation instituted to enjoin the merger:

> (1) Debenture, warrant and common stock owners complained that the Debentures and Common Stock, which were delisted from the New York Stock Exchange eighteen months before, had been trading in a thin, over-the-counter market at sorely depressed prices (App.104a); and,

(2) Debenture owners,

> claiming the "freeze out" violates the Indenture and creates defaults thereunder,

demand redemption at $1,033 or declaration of breach of the Indenture and payment of $1,000 principal plus interest (App. 145a-146a);

and,

Where the Debenture Indenture provides:

> "In case of any *** merger *** the holder of each Debenture then outstanding shall have the right thereafter to convert such Debenture into the *** property receivable upon such *** merger *** by a holder of the number of shares of Common Stock *** into which such Debenture might have been converted immediately prior to such *** merger." (§5.06, App. 514a) [Emphasis supplied.]

and,

Where, in settling the litigation, the Settlement Agreement (App. 160a) provides that:

> The Company will be merged into a subsidiary of the control stockholder, and,
>
> all shareholders will receive cash, and,
>
> the owners of convertible debentures have the option of either accepting $844.16 in cash, or of retaining the

debenture with the right, during its term, to convert into the cash equivalent of what a common stockholder would have received upon the merger:

QUESTION:

Did the Court below abuse its discretion in approving the settlement as fair, reasonable and adequate and in concluding that

> "the settlement abridges no rights of the debenture holders and can properly bind all debenture holders who do not opt out" (App. 370a)

STATEMENT OF THE CASE

I. NATURE OF THE CASE

A. This appeal involves a $32,000,000 all cash settlement of the first Rule 10b-5 freeze out merger class action case brought in this District[3/] after this

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3/ On February 20, 1976, five days after Marshel and two days after Green, Brucker, whose original complaint was filed on December 31, 1974, filed an amended complaint charging the defendants with an attempted Delaware short form "freeze-out" merger for no business purpose, in violation of the Securities Exchange Act of 1934 and Rule 10b-5 of the Rules and Regulations thereunder.

Court's decisions in Marshel[4] and Green.[5] Although three classes were involved -- common stock, warrants and convertible debentures[6] (App. 360a) -- only those owners of convertible debentures who did not affirmatively assent to the settlement are the object of Rome's concern (App. 244a).

B. The owners of $1,390,000 of Indian Head Inc. Debentures[7] went out of their way to communicate with plaintiffs directly, and indicated their approval of the settlement. The settlement offered owners of debentures, in cash, $851.65[8] (including accrued interest), which is

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4/ Marshel v. A.F.W. Fabric Corp. (Feb. 13, 1976), 533 F.2d 1277 (2d Cir. 1976) reh. en banc den. 533 F.2d 1309, judgment vacated 45 U.S.L.W. 3279 (Oct. 12, 1976).

5/ Green v. Santa Fe Industries, Inc. (Feb. 13, 1976), 533 F.2d 1283 (2d Cir. 1976) reh. en banc den. 533 F.2d 1309, cert. gr. 45 U.S.L.W. 3249 (Oct. 5, 1976).

6/ Which were redeemable for $1,033, at the issuer's option (App. 202a).

7/ Including investment bankers, L.F. Rothschild & Co., owners of $599,000 Debentures, and David Greene & Co. who owned $172,000.

8/ The settlement was net to the classes, defendant TBE having agreed to pay plaintiffs attorneys' fees and disbursements, as awarded by the Court, but not more than $600,000 in the aggregate (App. 363a).

18% less than the $1,033 Indian Head could have redeemed them for. Alternatively, the Debenture owners had the option of retaining them and converting them at any time into the cash equivalent of the $32 per share common stock settlement price. In such event, they would receive only $831.17 per debenture (App. 361a).

C. Objectants Rome (a Philadelphia lawyer and his wife, represented by the Philadelphia lawyer's brother), own $25,000 out of $14,295,000 of Convertible Debentures. They claim to object to the settlement on the grounds that their right to convert into common stock can never be taken away without their written consent (App. 368a). They make this claim even though they could lose the common stock conversion right through redemption or liquidation or bankruptcy.

D. After the three classes were certified by the Court below, notice was sent to all on August 2, 1976; hearings were held on October 13 and 18, 1976; the Court below approved the settlement on November 16, 1976, rejecting all of Rome's arguments, and denying him a stay on November 29, 1976; on November 30, 1976, the merger was

consummated; and to date, defendants-appellees advise that almost all of the more than $32,000,000 has been paid out.

II. THE OPINION BELOW.

(1) The Court's Opinion on Fairness.

In approving the settlement as fair, the Court below stated:

> "In the instant case, there are complicated questions of law on both the issues of liability and damages. While the role of a Court in determining the fairness of a settlement is not to decide these issues, the Court should, and here does, take note of the fact that these complex questions of law are unresolved, thus making this case an appropriate one for settlement. One of the primary unresolved legal questions involves the interpretation and application of Marshel, supra, Green, supra, and Merrit v. Libby, McNeill and Libby, 533 F.2d 1310 (2d Cir. 1976) to the attempted short-form merger in this case, particularly in light of the fact that the Indian Head merger is distinguishable on its facts from each of the above cases. Thus the Court does not agree with the objectors' assertion that liability is clear with respect to issues arising from the short-form merger. This case also presents complex legal and factual questions on a variety of other issues, among them: whether or not the 1973 and 1974 tender offers were false and misleading in failing to disclose that TBE would merge Indian Head into an affiliate; whether or not under Van Gemert v. Boeing, 520 F.2d 1373 (2d Cir.), cert. den., 423 U.S. 947 (1975), Indian Head was obligated to send notice of the tender offers to the registered debenture owners.

"In determining the reasonableness of the amount of the settlement in relation to the amount of a possible recovery after trial, the Court has considered the expert opinions submitted to the Court by Martin Whitman of M.J. Whitman & Co., and Robert Winston, of Winston Perry Financial Corporation, the evaluation by counsel, and the cost of litigating the aforementioned legal issues. The Court has also noted the favorable reaction of the classes to the settlement. In light of these factors, we find the settlement fair and reasonable." (App. 364a, 365a).

(2) The Court's Opinion on Appellants' Objections to the Settlement.

Breach of Contract. The Court below, in rejecting Appellants' breach of contract claims, determined at pages 369a and 370a:

"In the case of a merger, §5.06 requires that the supplemental Indenture contain the right to convert into whatever form of property the shareholders receive in the merger. Thus the debenture holders have never had an absolute right to convert into Indian Head stock in a merger, but only the right to convert into whatever form of 'property' the shareholders would receive. Defendants argue that cash is 'property' within the meaning of §5.06. We agree that cash

is within the scope of the term 'property' as used in §5.06 and note that it has been so interpreted in Broenen v. Beaunit, 440 F.2d 1244 (7th Cir. 1970). Here, as a result of the proposed merger, the Indian Head shareholders will receive only cash for their stock. Thus the provision in the settlement agreement allowing for conversion of the debentures into cash only is proper under §5.06 because this is all the shareholders are receiving. In addition, §5.06 does not require the individual written consent of each debenture holder when conversion rights are altered pursuant to a merger, so we conclude that the settlement abridges no rights of the debenture holders and can properly bind all debenture holders who do not opt out."

(3) Appellants' Other Claims.

The Court below rejected all of Appellants' claims:

"Since we find that no substantive rights of the debenture holders are abridged by this settlement, this dispenses with the following objectors' claims: 1) that representation of the class was not adequate since class representatives cannot assert rights running individually and severally to each holder (Objectors' Brief in Support of Objections to Proposed Settlement at 15-16,23-25); 2) that their constitutional rights under the Fifth and Fourteenth Amendments and Article One, Section 10 were violated (Id. at 16-17); 3)that the class is not sufficiently numerous, since not a sufficient number assented in writing (Id. at 23); and 4) that the settlement violates rights of all non-assenting convertible debenture

owners under Delaware law (Id. at 40), New York law (Id. at 41), and Pennsylvania law (Id. at 43)." (App. 370a, 371a) 9/

III. THE CONTRACT.

§§ 5.06 (App. 514a), 12.02 (App. 566a), 13.01 (App. 569a) and 13.02 (App. 570a) of the Indenture for the Convertible Debentures contain all of the terms which control Appellants' contract claim on this appeal. The pertinent portions read as follows:

1. Right to Merge - § 5.06, § 13.01 and § 13.02:

"Section 5.06. In case of any consolidation of the Company with or merger of the Company into another corporation, . . . the corporation resulting from such consolidation or such successor or acquiring person . . . shall execute and deliver to the Trustee a supplemental indenture, . . . providing that the holder of each Debenture then outstanding shall have the right thereafter to convert such Debenture into the kind and amount of shares of stock and other securities and property receivable upon such consolidation, merger, sale, lease or other disposition by a holder of the number of shares of Common Stock of the Company into which such Debenture might have been converted immediately prior to such consolidation, merger, sale or other disposition."

9/ The Court below went on to dispose of still other claims at App. 371a - 376a.

"Section 13.01. The Company will not ... merge into . . . any person unless (a) the successor formed by or resulting from such . . . merger (b) . . . shall expressly assume, by indenture supplemental hereto satisfactory in form to the Trustee, executed and delivered to the Trustee by the corporation . . . into which the Company shall have been merged . . . the due and punctual payment of the principal of and interest (and premium, if any) on the Debentures according to their tenor, and the due and punctual performance and observance of all the terms, covenants and conditions of this Indenture. . . to be performed or observed by the Company."

"Section 13.02. In case of any such . . . merger . . . and upon the execution by the successor corporation of an indenture supplemental hereto, as provided in Section 13.01, and upon compliance by such successor corporation with all applicable provisions of Section 5.06, such successor corporation shall succeed to and be substituted for the Company, with the same effect as if it had been named herein as a party . . . ."

2. Two-thirds Consent to Changes, Eliminations or Modifications - § 12.02:

"Section 12.02. With the consent . . . of not less than 66 2/3% in aggregate principal amount of the Debentures at the time outstanding, the Company, when authorized by a resolution of its Board of Directors, and the Trustee may . . . enter into an indenture or indentures supplemental hereto . . . for the purpose of adding any provisions to or changing in any manner or eliminating any of the provisions of this Indenture or of any supplemental indenture or of

modifying in any manner the rights and obligations of the holders of the Debentures and of the Company; provided, however, that no such supplemental indenture shall ... alter or impair the right to convert the same into shares of Common Stock at the rates and upon the terms provided herein without the consent of the holder of each Debenture so affected ... "

3. Redemption.

The reverse side of each Convertible Debenture Certificate contains the following description of redemption (App. 202a):

" *** the Debentures may be redeemed at the option of the Company as a whole or from time to time in part, at any time upon the notice referred to below at the following Regular Redemption Prices (expressed in percentages of the principal amount thereof), together in each case with interest accrued to the date fixed for redemption: if redeemed during the 12 months period beginning April 15.

***

1976 .....103.30%

***

and if redeemed on or after April 15, 1988, at 100%."

IV. THE FACTS.

Appellants, a Philadelphia lawyer, Morton Rome, and his wife,

> Own 25 Convertible Debentures ($25,000) (App. 361a) out of 14,295 ($14,295,000) (App. 365a);
>
> Are represented by Morton's brother, a Philadelphia lawyer, Edwin P. Rome;
>
> And claim that in this all cash merger, where §5.06 of the Indenture authorizes such a merger without the debenture owners' consent, the settlement is unconstitutional because their consent was not obtained (App.367a-368a).[10/]

In capsule form, the story of this case falls into four parts:

The Take-Over.

1. Indian Head Inc., a diversified $300,000,000 American conglomerate with Common Stock and Convertible Debentures listed on the New York Stock Exchange and Warrants to buy Common Stock (then exercisable at $25) listed on the American Stock Exchange, was taken over in 1973 and 1974 by Thyssen-Bornemisza Europe (TBE) (App. 358a).

2. Through two $27 per share tender[11/]

10/ As found by the Court below, where applicable.

11/ 33.9% and 56.7%, respectively.

offers[12] -- no notice of which was sent to the registered owners of Convertible Debentures -- TBE acquired a total of 90.6% of Indian Head common stock (App. 358a).

3. Indian Head's Common Stock and its Convertible Debentures were then promptly delisted from the New York Stock Exchange (September 1974) (App. 358a), and the market price for each fell below $16 and $500 respectively[13] (App. 104a).

4. Immediately prior to the July 1974 tender offer, the Warrants traded at about 4-3/4 (App. 104a) while thereafter, they fell below $2 (App. 104a).

5. After the take-over, the over-the-counter market for the Debentures and the Common Stock was thin and depressed (App. 104a).

The Proposed Merger.

On February 12, 1976 -- eighteen months after the take-over -- TBE announced (App. 359a) it proposed a

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12/ The second tender offer for common stock included an offer to buy the Warrants at $2.25 per Warrant, 31,000 of which were tendered or about 8% of the nearly 400,000 Warrants outstanding.

13/ Market quotations for debentures are in tenths.

short form Delaware all cash merger of Indian Head into a TBE subsidiary, on the following terms:

> $30 a share for the Common Stock ($3 more than the tender offer).
>
> $779 for each Debenture (which was $78 more than if it had been converted during the tenders.
>
> Nothing for the Warrants, which in 1976 were exercisable at $30 a share (App. 359a)

("Proposed Merger").

The Litigation.

1. After TBE acquired control, three class action suits followed in quick succession:

> First, on December 31, 1974, came plaintiffs-appellees Brucker and Kaplan ("Brucker"), record owners(as trustees) of 11 Debentures, on behalf of all Debenture owners (App. 7a),
>
> followed three weeks later by plaintiff-appellee Weinberger, a former Debenture owner, likewise for all Debenture owners (App. 359a),

and then in April 1975 by plaintiff-appellee Warrant owner Shamrock Corporation ("Shamrock") on behalf of all Warrant owners (App. 359a).

2. All three actions[14/] alleged that the tender offers resulted in the delisting of the Debentures and Common Stock, destroying the market values of those securities, and of the Warrants which were exercisable into Common Stock. The Debenture actions complained that no notice of the tender offers was sent to that class (whose members were registered owners), thereby depriving them of the right to convert for $701 when the Debenture market was about $650 (App. 104a).

3. Eight days after the Proposed Merger was announced, Brucker amended his complaint seeking to enjoin the merger on behalf of the owners of Debentures, Warrants and Common Stock. He claimed that the Indian Head minority investors were all being frozen out at unfair prices, and that the merger was a ruse to avoid redeeming the Debentures

---

14/ Motions for summary judgment class action determination and cross-motions to dismiss were sub judice when the Proposed Merger was announced.

for $1,033 (App. 39a).

4. Shamrock then amended its complaint, on behalf of Common Stock and Warrant owners and demanded rescission of the tender offers (App. 92a).

The Settlement.

1. On the return date of the motion to enjoin the Proposed Merger, TBE withdrew it and agreed to negotiate a settlement (App. 360a).

2. On July 28, 1976, a settlement of all three actions was ultimately concluded (App. 360a). It provided for an all cash merger of Indian Head into a TBE subsidiary, as follows:

(a) $32 per share for the Common Stock,

$851.65 for each Convertible Debenture (with accrued interest),

and

$4 for the Warrants; [15]

(b) The Debenture owners had the option to retain them, and a supplemental indenture under § 5.06 would be executed, to convert into $831 cash, the equivalent

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15/ Those who owned Warrants continuously from the second tender offer to the merger received $4; those who sold after the second tender offer received $1.50.

of $32 per share for the Common Stock (App. 361a).

3. The total cash payments under the settlement exceed $32,000,000 (App. 361a).

4. Debenture, Warrant and Common Stock classes were certified by the Court below, with Brucker representative of all classes, and his counsel lead counsel for all; Weinberger as representative of the Debenture classes and his counsel co-counsel for them; and Shamrock representative of the Warrant classes and its counsel co-counsel (App. 151a).

5. After 60 days' prior mail notice, and publication, two hearings on the fairness of the settlement[16/] were held by the Court below (App. 353a).

6. Rome, who filed a 51-page Brief, appeared at both hearings contending that the class settlement could not deprive him of his right to convert into Common Stock. (App. 193a).

16/ No warrant owner objected or opted out (App. 225a), owners of 3,271 shares of Common Stock opted out and owners of 1,050 shares objected (App. 225a).

7. The Court below approved the settlement, rejected Rome's objections and denied him a stay (App. 352a, 426a). The merger was consummated on November 30, 1976, and the more than $32,000,000 in settlement payments to all three classes commenced thereafter and are now being completed. 17/

17/ Plaintiffs-appellees were so advised by defendants-appellees and so represent to the Court.

POINT I

THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE ROME HAS FAILED TO ESTABLISH SUCH A PER SE BREACH OF CONTRACT OR PRIMA FACIE LIABILITY BY INDIAN HEAD AS WOULD CONSTITUTE ABUSE OF DISCRETION BY THE COURT BELOW

On the face of the Contract and under the law, the Court below did not abuse its discretion in finding that Rome never had an absolute right to convert into Common Stock.

A. LEGAL STANDARD.

The standard which Rome must meet to overturn the judgment below, was established by this Court long ago in In re Prudence Co., Inc., 98 F.2d 559 (2d Cir. 1938) at page 560:

> "The very purpose of a compromise is to avoid the determination of sharply contested and dubious issues, as this court pointed out in the case of In re Riggi Bros. Co., 2 Cir., 42 F.2d 174, 176. Hence, to succeed upon this appeal the applicant must show, assuming there are no issues of fact in dispute, that the rules of law for which she is contending are so clearly correct that it was an abuse of discretion for the district court to approve the settlement."
>
> [Emphasis supplied.]

See, City of Detroit v. Grinnell Corporation, 495 F. 2d 448, 455 (2d Cir. 1974); State of West Virginia

v. Chas. Pfizer & Co., 440 F.2d 1079, 1086 (2d Cir. 1971).

Since the Judge below "is on the firing line and can evaluate the action accordingly, . . ." his views are given "great weight". Ace Heating & Plumbing Co., Inc. v. Crane Company, 453 F.2d 30, 34 (3rd Cir. 1971); Grinnell, supra, p. 454.

Equally important is this fact:

> "The drafters of Rule 23 chose as a means of protecting the class the requirement that the district Court approve the settlement. They did not require rejection of a settlement on objection of a given part of the class."

Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3rd Cir. 1974).

B. THE ALLEGED ILLEGAL SETTLEMENT.

Rome claims a contract right so personal to him that a class action settlement cannot constitutionally take it away, (although, of course, a $1,033 redemption could). The Third Circuit unanimously rejected a similar claim in Bryan, supra, even though it was made by nearly twenty percent of the class in a Civil Rights sex discrimination case. There the 82 objectants (out of a class of 452) claimed the settlement stripped them of the right

to be free from discrimination, a personal right. They argued that:

> ". . . litigants should not be forced to abandon personal, as opposed to joint, rights without a judicial decision on the merits."
>
> (at page 803)

Rome makes the same point here -- that a class action cannot take away his individual contract right to convert into Common Stock.

But Chief Judge Seitz, in words of equal truth to Rome, said in Bryan, at page 803:

> "The present Rule 23, however, makes no distinction for settlement purposes between class suits formerly called 'true' class actions, where the class shares a joint right or liability, and class suits formerly denominated 'hybrid' or 'spurious', where rights or liabilities are several. Fed. R. Civ.P. 23(e), 23.1, 23.2; see J. Moore, 3B Moore's Federal Practice ¶ 23.80 [1] & [2] (2d ed. 1974). Thus, if it is improper to approve a settlement compelling appellants to abandon their claims against defendants, this impropriety must spring from the nature not of personal rights in general but of the specific rights asserted by the class here."

The Bryan objectants argued that since actions by the Attorney General under the Civil Rights Act could not bind the "discriminatee", neither could class representatives. Just so here Rome attacks plaintiffs' representation as being unfair. Chief Judge Seitz

responded in Bryan that:

> "The class representatives do not bind dissenting class members; the district court, not the class representatives, must determine that the settlement is fair and reasonable.
> [Emphasis supplied.]
>
> "* * *
>
> "Unlike suit by the Attorney General or even by a 'private attorney general', who sues to protect public rights, the class action seeks to vindicate the rights of specific individuals, the class members; and unlike the public action for a class action to be maintained the class representatives must be members of the class, have claims typical of the class and adequately represent the interests of absent class members. Fed.R.Civ.P. 23(a). Further, this action having been classed as a 23(b)(3) . . ., the class members were given the opportunity to opt out of the litigation. It does not seem anomalous to allow a court-approved class settlement, but not a suit by the Attorney General, to compromise a discriminatee's Title VII claim."
> [Emphasis supplied.]

Rome ignores his right to opt-out as if it wasn't there. But it is at the heart of Rule 23, the complete answer to his constitutional and injunction arguments. For, by opting out, Rome could have escaped unscathed from the class action embrace. Re 4 Seasons Sec. Lit., 502 F.2d 834, 843, 844 (10th Cir.), cert. den. 419 U.S. 1034 (1974). If he felt the settlement

deprived him of his rights, he could have opted out and pursued them on his own: Having refused that opportunity, he is bound here, as the women objectants were in Bryan.

Rome had his day in court -- two days at that. But he did not convince Judge Stewart that his contract right was so established that the settlement was per se a violation of law. He failed, just as did objectant in Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1974), and for the same reasons. In Grunin, objectant claimed that the settlement perpetuated the very anti-trust violations the litigation was intended to stop. So here, Rome says the settlement is the vehicle for the very freeze-out which the litigation attacked. But the Grunin Court, on facts and law equally applicable to Rome, sustained the approval of the settlement. After first pointing out that:

> "Under Rule 23 (e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members."
> [Citations omitted, p. 123]

Judge Stephenson outlined the principles applicable to consideration of the claim that a settlement is illegal:

> "We agree with appellant's statement that a court cannot lend its approval to any

> contract or agreement that violates the antitrust laws. See Kelly v. Kosuga, 358 U.S. 516, 520, 79 S.Ct. 429, 3 L.Ed. 2d 475 (1959); Continental Wall Paper Co. v. Louis Voight & Sons, Co., 212 U.S. 227, 261-67, 29 S.Ct. 280, 53 L.Ed. 486 (1909). However, we are equally mindful of the fact that 'neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.' City of Detroit, 495 F.2d at 456.
>
> "* * *
>
> "Thus, unless the terms of the agreement are per se violations of antitrust law, we must apply a 'reasonableness under the totality of the circumstances' standard to the court's approval. Based on the record before us, we cannot say as a matter of law that the settlement agreement included any such violations."
>
> [pp. 123, 124]

Just as Judge Stewart reviewed the legal issues here and found them conflicting and complex (App. 364a), so the Grunin Court reached the same conclusion:

> "This brief survey of the theories advanced by the parties is not intended to be an appraisal of the merits of the claims in contention. It does illustrate, however, that the alleged illegality of the settlement agreement is not a legal certainty."
>
> [at p. 124]

We submit that the record here, as in Grunin does not support the claim that the settlement agreement included any violations of law.

C. THE ALLEGED BREACH OF CONTRACT CLAIM.

If the illegality of the settlement in Grunin was not a legal certainty, here it is not even a viable possibility. For § 5.06 specifically authorizes a merger where, as here, the debenture owner receives the equivalent "property" received by the common stockholder in the merger. That cash is property, is beyond cavil, both generally and under New York law which is controlling (App. 576a):

> "Considering the natural and ordinary connotation of the term 'property,' there is no doubt that it is one of broad application, sufficiently comprehensive to include both tangible and intangible property, and so, money. Webster's New International Dictionary; 50 Corpus Juris, 729; Pirie v. Chicago Title & Trust Co., 182 U.S. 438, 443, 21 S.Ct. 906, 45 L.Ed. 1171; People v. Williams, 24 Mich. 156, 9 Am.Rep. 119; In re Fixen, 9 Cir., 102 F. 295, 60 L.R.A. 605; Fidelity & Deposit Co. v. Arenz, 290 U.S. 66, 54 S.Ct. 16, 78 L.Ed. 176."

Tri-Lakes SS Co. v. Com'r., 146 F.2d 970, 972 (6th Cir. 1945); Marine Midland Trust Co. v. Allegheny Corp., 28 F.Supp. 680, 683 (S.D.N.Y. 1939); People v. Wagner, 120 Misc. 214, 217 (Sup.Ct. 1923).

Accordingly, substituting "cash" for "property", § 5.06 reads:

> "In case of any *** merger *** the holder of each debenture then outstanding shall have the right to convert such debenture into the cash receivable upon such *** merger *** by a holder of the number of shares of common stock *** into which such debenture might have been converted immediately prior to such *** merger."
>
> [emphasis supplied]

The identical language of § 5.06 was before the District Court, and affirmed by the Court of Appeals, 7th Cir., in Broenen v. Beaunit Corporation, 305 F.Supp. 688 (E.D. Wisc., 1969), aff'd. 440 F.2d 1244 (7th Cir. 1970). The Beaunit convertible debenture was convertible into shares of Old Beaunit and the conversion would have been a non-taxable event. But Old Beaunit was merged into a wholly owned subsidiary of El Paso. The conversion into the subsidiary's common stock was a taxable event. Plaintiff alleged that the economic result of this change is a permanent reduction in the value of the shares "resulting in total damages of $2,500,000." (305 F.Supp. at page 690).

Plaintiff contended that the merger involved a material breach of two provisions of the indenture, which are almost identical to Indian Head Sections 13.01 and 5.06.

Beaunit's §5.10 is almost a carbon copy of §5.06 here:

Beaunit Section 5.10	Indian Head Section 5.06
"In case of any *** merger of [Old Beaunit] into any other corporation ***, the corporation into which [Old Beaunit] shall have been merged *** shall execute and deliver to the Trustee a supplemental indenture providing that the holder of each Debenture then outstanding shall have the right thereafter *** to convert such Debenture into the kind and amount of shares of stock and other securities and property receivable upon *** such merger *** by a holder of the number of shares of Common Stock of [Old Beaunit] into which such Debenture might have been converted immediately prior to such *** merger. ***"	"In case of any *** merger of the Company into another corporation, *** such successor *** shall execute and deliver to the Trustee a supplemental indenture, *** providing that the holder of each Debenture then outstanding shall have the right thereafter to convert such Debenture into the kind and amount of shares of stock and other securities and property receivable upon such *** merger, by a holder of the number of shares of Common Stock of the Company into which such Debenture might have been converted immediately prior to such *** merger. ***"

The Court of Appeals in Beaunit confirmed that the merger Section 5.10 provided for conversion into cash:

> "We find, as did the district court, that the language of §5.10 expressly contemplated and authorized the substitution of "other securities and property" for common stock of the successor corporation as that into which the debentures are to be convertible after a merger. *** While it is true that not until a year after the adoption of the Business Corporation Law in 1961 did the New York statutes authorize the exchange of "cash or other consideration" in a statutory

> merger such as took place here, it does not follow that §5.10 must be construed so as to render it consistent with the antecedent statutory law. It is an ancient principle of contract law that parties are presumed to have contracted with knowledge of and consistent with the law in effect at the time of execution of a contract. It must be presumed, therefore, that the parties to the indenture knew that at the time of the execution of the indenture the applicable statute authorized the use of 'other securities and property' as consideration in statutory mergers and that they understood and intended the obvious purport of the language of §5.10 of the indenture to authorize such exchange." (440 F.2d 1244 (1970))
>
> [Emphasis supplied.]

Moreover, the Court of Appeals held that if there were a conflict between Sections 5.10 and 13.01, 5.10 controlled because:

> "*** §5.10 is specifically addressed to the question as to what items may be used for conversions following a merger whereas [§§13.01 and 13.02 deal] only with the obligations of a successor to a merger generally. Specific provisions must control general ones." 440 F.2d 1244, at 1249.

Like Beaunit, the Indian Head Indenture guarantees the right upon a merger to convert into whatever property the common stock receives, in this case, cash. There is nothing unusual about it. /[19] Plaintiffs

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19/ Rome's prediction, Point VII (Brief 64-66), that the settlement "will set a unique precedent that could well foreclose the future underwriting and issuance of convertible debentures in the capital markets of the United States by issuers whose common stock is (cont'd.)

placed in the record four New York Stock Exchange listed companies with debentures covertible into cash. (App.336a-337a).

On this record, and on the law, Rome's breach of contract claim is not within hailing distance of that kind of certainty which could lead this Court to even begin to entertain overturning the judgment below. In Grinnell, a private anti-trust case, the government had won its case against the defendants. Plaintiffs said that a settlement of 12% of the potential recovery was unfair as a matter of law because the government case had prima facie established defendants' liability.

But Judge Moore pointed out that a defendant convicted in a government anti-trust case was not prima facie liable in a civil case.

Judge Moore then concluded at page 456:

> "Since defendants' liability was not prima facie established it becomes necessary to consider the strength of the case presented by the class members in order to determine whether there is any basis for appellants' claim that the settlement was grossly unfair

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19/ cont'd.
expected to rise," (Brief, p.65) is as ridiculous as it is unsupported by a scintilla of evidence in this record, or anywhere else. If Rome were a seer, such substantial holders as L.F. Rothschild & Co. & David J. Greene & Co., both underwriters, would hardly have approved the settlement, much less urged it (App.365a).

> and inadequate. It cannot be overemphasized that neither the trial court in approving the settlement nor this Court in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute. It is well settled that in the judicial consideration of proposed settlements, 'the [trial] judge does not try out or attempt to decide the merits of the controversy,' West Virginia v. Chas. Pfizer & Co., supra, 314 F.Supp., at 741, and the appellate court 'need not and should not reach any dispositive conclusions on the admittedly unsettled legal issues . . . " West Virginia v. Chas. Pfizer & Co., supra, 440 F.2d, at 1085-1086.

Similarly here, Rome utterly fails to establish prima facie Indian Head's liability to provide conversion into common stock. He cites no Indenture provisions to support the claim. Instead, he argues at page 27 of his Brief:

> "The promise of Indian Head and its obligations, as expressed in the Debentures and in the Indenture, was that the Debenture holder would have the right to convert into shares of common stock at the rates (25.974 shares of common stock per $1000 Debenture) and upon the terms provided in the Indenture without alteration or impairment, in the absence of the written consent of each holder of each Debenture affected. (202a, 483a-484a). This promise ran severally to each Debenture holder. (576a)."

Rome's appendix references are barren of an iota of support for this argumentative conclusion. On page 27 he ignores §5.06. Later, at page 42, he doesn't

deny that §5.06 is dispositive. He just says it shouldn't be. Quoting Brandeis and Holmes on "realities" and "right conduct" (Brief, p.43), Rome actually asks this Court to reverse Judge Stewart,

not on the facts,

not on the law,

but on

> "The realities of this case and the rationale of this Court in Boeing, supra, in conjunction with the fundamental concepts of the law pertaining to corporate fiduciary and contractual obligations, the supremacy of substance over form, along with the basic motivation for convertible debenture purchases, all join to controvert the District Court's views on this subject." (Brief p.42)

It is not Judge Stewart who has abused discretion, but Rome who abuses the time of this Court by so specious and far-fetched an "argument", thinly concealing his real aim: to force redemption at $1,033.

D. ROME's FREEZE-OUT MERGER CLAIM.

Rome comes just a little late to Boeing,[20/] Marshel, supra, and Green, supra. As soon as Boeing was decided in August, 1975, while Brucker's class and summary

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20/ Van Gemert v. Boeing Co., 520 F.2d 1373 (2d Cir.) cert. den. 423 U.S. 947 (1975).

judgment motions were sub judice, Brucker brought Boeing to Judge Stewart's attention. And Boeing, along with Marshel and Green, were what Brucker's preliminary injunction against the Proposed Merger was all about.

It is the plaintiffs' Boeing, Marshel and Green claims which this settlement settled. It is those plaintiffs' claims which Judge Stewart discussed and evaluated in approving the settlement (App. 364a).

The record here amply shows that Rome's attacks on the defendants are little more than a regurgitation, two years late, of the plaintiffs' charges in the seven complaints which comprise this litigation. All of them were settled, and nowhere does Rome demonstrate that their settlement was unfair. Having failed to sustain his burden of establishing prima facie liability flowing from the merger freeze-out, a minute analysis would be superfluous.

POINT II

ROME'S APPEAL IS AS MOOT AS IT IS IRRELEVANT WITH RESPECT TO THE WARRANT AND STOCKHOLDER CLASSES FOR WHICH HE MAKES NO CLAIM

Rome appeals from the entire settlement, even though he disclaims any interest in the warrant and stockholder classes of which he is not a member. All of his questions on this appeal relate to his debenture breach of contract claim for specific performance. Having no claims as to the warrants and common stock, he has no appeal.

Rome's motion for a stay was denied in the District Court and not renewed here. As a result, the merger was consummated and the settlement proceeds distributed to the warrant and stockholder classes, as well as the debenture classes. Thus, this appeal is moot as to all those who have been paid, and should be dismissed.

POINT III

ROME'S NON-CONTRACT CLAIMS ARE ACADEMIC, IRRELEVANT AND NEED NOT BE REACHED BECAUSE THEY CANNOT GIVE HIM THE ONLY RELIEF HE ASKS: SPECIFIC PERFORMANCE

If this Court were to grant Rome's only request

> to prohibit impairment of his conversion right into common stock and that of those who have not affirmatively consented to the settlement,
> (Brief, p. 66)

then obviously all his other attacks on the settlement would be moot.

Likewise, if it is denied, his other arguments cannot give him the conversion right.

A new class notice will not give Rome the common stock conversion privilege:

neither will different class representation;

neither will Rule 23 procedures;

neither will the withdrawal of the preliminary injunction;

neither will federal securities registration;

neither will any of his other criticisms.

All of Rome's non-contract arguments add more inartistic verisimilitude to his bald and unconvincing claim

that Judge Stewart abused his discretion. It would be an academic exercise for this Court to treat with each of Rome's innumerable, irrelevant and unsupported diversions. Defendants' brief cogently dissects them and plaintiffs hereby adopt it, by reference.

CONCLUSION

This appeal from a whole judgment, which deals with a part -- and a part of a part at that -- is puzzling to begin with. It becomes bewildering because it is apparent that the decision Rome seeks would mean:

> That no American corporation could consummate a cash merger without the written consent of each owner of Convertible Debentures, even where his contract permits such a merger.

It would mean:

> that this Court should determine that Congress, in writing the Securities Exchange Act of 1934 (whose 10b-5 jurisdiction is invoked here), and the legislatures of Delaware and New York, in adopting their corporate statutes, intended such a result.

And, it would mean:

> that this Court must rewrite not only

those federal and state statutes, but the common law and Federal Rule 23 as well.

The enormity of that proposition pales beside its twin: that the Court below must be reversed for failing to exercise the discretion which would have been required to make such landmark law, on its own, without precedent.

Such a fantastic result would also require this Court to repeal that part of Rule 23 which permits settlements of class action litigation such as this. For Rome is saying to this Court, and to plaintiffs -- without ever citing any authority -- that no Debenture owners (here or elsewhere) could ever be certified as a class, and their claims in this or any litigation could never be settled, without the express written consent of each and everyone.

We submit that to state that proposition is to deny it!

But it is also to question the viability of this appeal at all. For query: Should Rome, a lawyer who was in contact with plaintiffs' counsel prior to and during the settlement negotiations (App. 769a), have advised them that the Debenture claim could never be settled and, if it was, Rome

would litigate to the end?

At the hearing, Rome said No!:

> "I am not aware, sir, that I am obliged or any member of the convertible debenture holder class is obliged, where we are represented by a fiduciary of that debenture owner class, to intrude at that juncture in the very settlement negotiations, as to which we already have had a lead counsel appointed." (App. 313a)

It is difficult to reconcile that statement with Rome's position below and on this appeal, where he challenges the adequacy of plaintiffs' representation because they did not insist upon obtaining the written consent of the Debenture owners.

Rome stood silently by for nearly a year believing that plaintiffs' counsel had a constitutional obligation not to settle. He kept it a secret until the eve of the hearing. Yet he talks of plaintiffs' fiduciary obligation, while disregarding his own. The result was a consuming contest, with re-runs, and an appeal, which might have been avoided had he told plaintiffs' counsel that as a matter of law, this case could never be settled. 21/

21/ Of course, this Court has the power to impose costs and attorneys' fees where an appeal is considered frivolous or vexatious. For example, they were imposed upon a

(Continued on page 41)

ON THE FACTS, ON THE LAW AND AS A MATTER OF PUBLIC AND JUDICIAL POLICY, THIS APPEAL SHOULD BE DISMISSED, WITH COSTS AND ATTORNEYS' FEES TO APPELLEES.

Dated: New York, New York
March 8, 1977

Respectfully submitted,

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21/, cont'd.
layman plaintiff in Furbee v. Vantage Press Inc., 464 F.2d 835 (D.C.Cir. 1972), where the contract required suits to be brought in New York, plaintiff sued in the District of Columbia, lost and then appealed, even though the law against him was clearly established. See, Oscar Gruss & Son v. Lumbermens Mutual Casualty Co., 422 F.2d 1278 (2d Cir. 1970); Fluoro Electric Corporation v. Branford Associates, 489 F.2d 320 (2d Cir. 1970); N.L.R.B. v. Bedford Discounters, Inc., 484 F.2d 923 (1st Cir. 1973); and generally, Hall v. Cole, 36 L.Ed.2d 702 (1973) and Alyeska Pipeline Company v. Wilderness Society, 421 U.S. 240 (1975).

STATE OF NEW YORK
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK

Arturo Guzman, Jr. , being duly sworn, deposes and says, that he is over 18 years of age. That on the 9th day of March , 1977 , he served 2 Copies of the attached Brief for Plaintiffs-Appellees on the attorneys for the respective Appellees and Appellants herein by depositing the same, properly enclosed in a securely sealed post-paid wrapper , in a U. S. Post Office at 90 Church Street, New York City, directed to said attorneys as follows:

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th being the place where they maintain their offices for the regular transaction of business, and the last address es mentioned in the papers last served by them

Arturo Guzman, Jr.

Sworn to before me this

9th day of March , 1977 .

Monroe D. Rosen

MONROE D. ROSEN
Notary Public, State of New York
No. 24-4616690
Qualified in Kings County
Commission Expires March 30, 1977

State of New York)
County of New York)

Jose Sierra being duly sworn, deposes and says Deponent is not a party to this action and over the age of 18 years, residing at 878 Driggs Avenue, Brooklyn, New York. On the 9th day of March 1977, deponent served two (2) copies of the Appellees Brief upon Shearman & Sterling, 53 Wall Street, New York, New York 10014 herein by delivering to them the aforesaid two (2) Copies personally, Deponent knew the person so served to the person in charge of office

Jose D. Sierra

Sworn to before me
March 9th, 1977
Monroe D. Rosen

MONROE D. ROSEN
Notary Public, State of New York
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Commission Expires March 30, 1977